

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Saga Communications of New England, L.L.C.)	File No. EB-06-IH-0825
)	NAL Account No. 200732080018
Licensee of Station WAQY(FM),)	Facility ID No. 58551
Springfield, Massachusetts)	FRN No. 0002749406

FORFEITURE ORDER

Adopted: September 25, 2009**Released: September 25, 2009**

By the Acting Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we impose a monetary forfeiture of \$4,000 against Saga Communications of New England, L.L.C. (“Saga”), licensee of Station WAQY(FM), Springfield, Massachusetts, for violating Section 73.1216 of the Commission’s rules¹ by failing to conduct a broadcast contest substantially as announced.

II. BACKGROUND

2. On December 31, 2005, Mr. Robert Naginewicz filed a complaint with the Commission,² alleging that Station WAQY(FM) failed to conduct a contest broadcast by the Station in June and July 2005 according to that contest’s advertised rules. According to Mr. Naginewicz, on July 17, 2005, he won the contest’s “Grand Prize Giveaway.” The prizes included a free two-year lease on a 2005 Buick LaCrosse automobile, or its cash equivalent, from the co-sponsor, Bob Pion Pontiac, and a “trunk load full” of Aerosmith memorabilia.³ Mr. Naginewicz alleged that although he was assured by the Station’s staff that all of his prizes would be delivered to him by July 22, 2005, he did not receive the monetary portion until August 18, 2005, and that, despite numerous queries made of the Station’s staff, he was still awaiting delivery of the memorabilia portion as of December 31, 2005, almost a half year after the contest had concluded.⁴

3. Following Mr. Naginewicz’s complaint, the Enforcement Bureau (“Bureau”), by letter dated January 24, 2006,⁵ inquired of Saga concerning these allegations. Saga responded on March 2,

¹ See 47 C.F.R. § 73.1216.

² See letter from Mr. Robert Naginewicz to the FCC, dated December 31, 2005 (“*Complaint*”).

³ See *id.* at 1-2.

⁴ See *id.* at 2-3.

⁵ See letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Saga Communications of New England, L.L.C., dated January 24, 2006 (“*LOP*”).

2006,⁶ contending that its one-month delay in delivering the monetary portion of the prize, although less than ideal, was “within the zone of reasonableness.”⁷ It acknowledged, however, that its failure to fulfill the memorabilia portion until after Mr. Naginewicz had contacted the Commission, represented a Station “problem” that it claimed to have resolved after the Commission’s inquiry.⁸ Saga indicated that, because of its delay in fulfilling its promise to Mr. Naginewicz, it enhanced the award made to him by contributing additional prizes.⁹ On March 2, 2007, the Bureau issued a Notice of Apparent Liability (“NAL”)¹⁰ for \$4,000 against Saga, rejecting its arguments that no rule violation occurred.

4. On April 2, 2007, Saga responded to the NAL.¹¹ Saga argues that its failure to promptly award the contest prizes in question cannot be deemed prohibited conduct because “promptness” is not an enumerated requirement identified in the licensee-conducted contest rule.¹² Saga further argues that, even if its conduct could be deemed to have violated the contest rule, the NAL erred in concluding that Saga acted “willfully.”¹³ Saga contends that its failure to fully complete its award of the prizes in a prompt manner was due to inadvertence, employee miscommunication, and not any deliberate or conscious attempt to avoid its obligations, and that this was demonstrated by its ultimate award of all promised prizes including bonus items to compensate the complainant for his trouble.¹⁴ Saga urges that the Commission cancel or substantially reduce the proposed \$4,000 forfeiture amount.¹⁵

III. DISCUSSION

5. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act,¹⁶ Section 1.80 of the Commission’s rules,¹⁷ and the Commission’s

⁶ See letter from Lawrence D. Goldberg, Vice President, Saga Communications of New England, L.L.C., to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, dated February 28, 2006, and filed through its counsel on March 2, 2006 (“LOI Response”).

⁷ See *id.* at 4.

⁸ See *id.* at 4-5.

⁹ See *id.* at 3. The memorabilia portion of the prize was ultimately delivered to Mr. Naginewicz on February 8, 2006. See *id.*

¹⁰ See *Saga Communications of New England, L.L.C.*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 4206 (Enf. Bur., Investigations & Hearings Div. 2007) (“NAL”).

¹¹ See Response to Notice of Apparent Liability for Forfeiture, dated April 2, 2007 (“NAL Response”).

¹² See *NAL Response* at 4-6 (citing *Nat’l Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985) and *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) for the proposition that an agency departure from its precedent “must provide a principled explanation for its change of direction”).

¹³ See *NAL Response* at 6-10.

¹⁴ See *id.* at 2.

¹⁵ See *id.* at 6, 10.

¹⁶ See 47 U.S.C. § 503(b).

¹⁷ See 47 C.F.R. § 1.80.

forfeiture guidelines set forth in its *Forfeiture Policy Statement*.¹⁸ In assessing forfeitures, Section 503(b) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.¹⁹ As discussed further below, we have examined Saga's response to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and find no basis for cancellation or reduction of the forfeiture.

6. Under Section 73.1216 of the Commission's rules, a broadcast licensee must conduct Station-sponsored contests "substantially as announced or advertised," and must disclose fully and accurately the "material terms" of such contests.²⁰ Material terms, among other things, include any eligibility restrictions, means of selection of winners, when prizes can be won, and instructions regarding entry and participation.²¹

7. Saga argues that the proposed sanction for an untimely award of contest prizes represents a departure from the Commission's precedent, or an abuse of discretion.²² We disagree with Saga's contention that the *NAL*'s holding is not supported by Commission precedent.²³ The Commission has clearly stated that prizes must be awarded promptly. In its 1974 Public Notice regarding licensees' failure to conduct contests fairly, the Commission expressed its concern that "serious questions would be raised" respecting practices including "failing to award prizes, or failing to award them within a reasonable time."²⁴ Similarly, in its 1975 Notice of Proposed Rulemaking concerning the contest rule, the

¹⁸ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

¹⁹ See 47 U.S.C. § 503(b)(2)(E).

²⁰ See 47 C.F.R. § 73.1216. See also *New Northwest Broadcasters*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 9352 (Enf. Bur. 2004) (forfeiture paid); *ABC, Inc.*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 25647 (Enf. Bur. 2003) (forfeiture paid); *Isothermal Community College*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23932 (Enf. Bur. 2003) (forfeiture paid); *Citicasters Co.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16612 (Enf. Bur. 2000) (forfeiture paid).

²¹ See 47 C.F.R. § 73.1216, notes 1(b) and 2. Note 1 to that rule provides in relevant part that the material terms of a contest include "how to enter or participate; eligibility restrictions; entry deadline dates; whether prizes can be won; when prizes can be won;" and "time and means of selection of winners." Note 2 to the rule states:

In general, the time and manner of disclosure of the material terms of a contest are within the licensee's discretion. However, the obligation to disclose the material terms arises at the time the audience is first told how to enter or participate and continues thereafter. The material terms should be disclosed periodically by announcements broadcast on the Station conducting the contest, but need not be enumerated each time an announcement promoting the contest is broadcast. Disclosure of material terms in a reasonable number of announcements is sufficient. In addition to the required broadcast announcements, disclosure of material terms may be made in a non-broadcast manner.

²² See *NAL Response* at 5-6.

²³ See *id.* at 5-6.

²⁴ See *Public Notice Concerning Failure of Broadcast Licensees to Conduct Contests Fairly*, Public Notice, 45 FCC 2d 1056 (1974).

Commission listed various hypothetical situations that illustrate the types of practices that would violate the proposed rule.²⁵ One of these hypothetical situations involved a contest offering an automobile, in which the winner did not receive the prize until more than a year after the contest ended.²⁶ The Commission stated that the delayed award of the prize was improper and further noted that “[t]he prompt award of prizes at the conclusion of a contest is an implied term of every contest. Unreasonable delay in awarding prizes, therefore, is a failure to conduct the contest substantially as announced.”²⁷ Finally, while the Commission did not ultimately include promptness in the awarding of contest prizes as a specific example in its final rule, it did indicate its “continued concern for the abuses described in our 1966 and 1974 Public Notices and, to the extent that they have not been superseded by the new rule, we shall continue to enforce the policies summarized therein.”²⁸ As a result, the *NAL*’s finding did not constitute a departure from agency precedent or an abuse of discretion.

8. Additionally, as noted in the *NAL*, the Station’s own contest rules anticipate that award fulfillment of prizes would be completed no more than thirty days from the drawing.²⁹ As the *NAL* found, and Saga does not dispute, nearly seven months passed between the time that the contest concluded and the time it fulfilled its award of the memorabilia portion of the prize.³⁰ Under the circumstances of this case, we find that Saga’s delay in award fulfillment violated a material term of its own contest rules. Although Saga indicates that it took subsequent remedial steps to correct its internal procedures to avoid recurrence, and that it also enhanced the number of prizes awarded to the complainant in recompense, these factors are neither exculpatory nor mitigating.³¹

9. We reject Saga’s argument that its rule violation was not “willful.” Saga argues that its failure to promptly award Mr. Naginewicz’s prizes was inadvertent, and not a deliberate or conscious attempt to avoid its obligations.³² Whether Saga intended to violate the contest rules is immaterial, however. Under Section 503(b), “willful” refers to “the conscious and deliberate commission or omission

²⁵ See *Amendment of Part 73 of the Commission’s Rules Relating to Licensee-Conducted Contests*, Notice of Proposed Rulemaking, 53 FCC 2d 934 (1975).

²⁶ See *id.* at 942.

²⁷ See *id.*

²⁸ See *Amendment of Part 73 of the Commission’s Rules Relating to Licensee-Conducted Contests*, Report and Order, 60 FCC 2d 1072, 1073 (1976) (internal citation omitted). The resulting rule did not supersede the earlier Commission policy concerning promptness in the awarding of contest prizes. See *id.* at 1073-74.

²⁹ See *LOI Response* at 2. The generic contest rules submitted by Saga, which it asserts applied to this contest, provide that “[w]inners will be expected to claim prize . . . within 30 days of being notified that they are winners, unless there is an expiration date on prize which will be specifically stated.” *Id.*; see *LOI Response* at Attachment 4, unnumbered pages 3-4.

³⁰ See *NAL*, 22 FCC Rcd at 4206-208 ¶¶ 3 and 5; see also *NAL Response* at 2.

³¹ See, e.g., *Capstar TX Limited Partnership (WKSS(FM))*, Notice of Apparent Liability, 20 FCC Rcd 10636 (Enf. Bur. 2005) (forfeiture paid) (finding remedial efforts undertaken after complaint lodged not mitigating) (citing *AT&T Wireless Services, Inc.*, Notice of Apparent Liability, 17 FCC Rcd 21866, 21871 (2002); *KVGL, Inc.*, Memorandum Opinion and Order, 42 FCC 2d 258, 259 (1973)).

³² See *NAL Response* at 6-9.

of [any] act, irrespective of any intent to violate” the law.³³ Saga asserts that its failure to award the prizes was not conscious or deliberate, but the facts before us belie that claim. Mr. Naginewicz repeatedly contacted Saga over a period of several months in an effort to obtain the memorabilia portion of the prize, but to no avail.³⁴ It was not until Saga received the Bureau’s *LOI* that it finally awarded the prizes.³⁵ Saga was under an affirmative obligation to honor the terms of its contest, and it failed to do so despite repeated inquiries by the winner. Under these circumstances, Saga’s assertion of mere inadvertence is not plausible, and we find that Saga’s failure to promptly award the prizes was “willful” within the meaning of Section 503(b).

10. Saga further claims that its lapse was due to the failure of its employees to properly contact and respond to Mr. Naginewicz’s pleas.³⁶ The Commission, however, has long held that licensees and other Commission regulatees are responsible for the acts and omissions of their employees and contractors,³⁷ and when the conduct of such individuals has resulted in violations, the Commission has “consistently refused to excuse licensees from forfeiture penalties.”³⁸ Nothing in the instant record suggests that we should depart from such precedent in the instant case. Accordingly, as a result of our reviewing Saga’s response to the *NAL*, and in view of the statutory factors and the *Forfeiture Policy Statement*, we affirm the *NAL* and issue a monetary forfeiture in the amount of \$4,000.

IV. ORDERING CLAUSES

11. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s rules,³⁹ Saga Communications of New England, L.L.C., **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$4,000 for willfully and repeatedly violating Section 73.1216 of the Commission’s rules.

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the rules⁴⁰ within thirty (30) days of the release of this *Forfeiture Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.⁴¹ Payment of the forfeiture must be made by check or similar instrument,

³³ See 47 U.S.C. § 312(f)(1); *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

³⁴ See *Complaint* at 2-3.

³⁵ See *supra* note 9.

³⁶ See *NAL Response* at 6-9.

³⁷ See, e.g., *Wagenvoord Broadcasting Co.*, Memorandum Opinion and Order, 35 FCC 2d 361 (1972) (holding a licensee responsible for violations of FCC rules despite its reliance on a consulting engineer); *Petracom of Joplin, L.L.C.*, Forfeiture Order, 19 FCC Rcd 6248 (Enf. Bur. 2004) (holding a licensee liable for its employee’s failure to conduct weekly EAS tests and to maintain the “issues/programs” list).

³⁸ See *American Paging, Inc. of Virginia*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 10417, 10420 ¶ 11 (WTB, Enf. & Cons. Inf. Div. 1997) (quoting *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1244 (1984)).

³⁹ See 47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

⁴⁰ See 47 C.F.R. § 1.80.

⁴¹ See 47 U.S.C. § 504(a).

payable to the order of the Federal Communications Commission. The payment must include the NAL/Account No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account Number in block number 24A (payment type code). Saga will also send electronic notification on the date said payment is made to Hillary.DeNigro@fcc.gov, Ben.Bartolome@fcc.gov, Kenneth.Scheibel@fcc.gov, and Paul.Noone@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

13. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent, by Certified Mail/Return Receipt Requested, to Saga Communications of New England, L.L.C., 73 Kercheval Avenue, Grosse Pointe Farms, Michigan 48236, by regular mail to its counsel, Gary S. Smithwick, Esq., Smithwick & Belendiuk, P.C., 5028 Wisconsin Avenue, N.W., Suite 301, Washington, D.C. 20016.

FEDERAL COMMUNICATIONS COMMISSION

Suzanne M. Tetreault
Acting Chief, Enforcement Bureau